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Supreme Court, U S
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No. 08-639

In The
Supreme Court of the United States

Michael M. McAfee, d/b/a McAfee MX
Petitioner

Vs.

Rick Foster,
Phillip Fitzgerald
James and Sherri Estrada
Ray and Gabrielle Fletcher
Steve and Sandy Fairfield
Tim Hitchcock and Haden Cowdry
Respondents.

On Petition for Writ of Certiorari
To the Court of Appeals,
Second District of Texas-Fort Worth

Supplemental Appendix

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S. App. 1

#02-07-00080-CV
COURT OF APPEALS
2ND DISTRICT OF TEXAS
FORT WORTH

MCAFEE MX
d/b/a MCAFEE MOTO CROSS
AND MICHAEL M. MCAFEE — APPELLANTS

V.

RICHARD FOSTER, ET AL — APPELLEES

MOTION TO CHALLENGE
SUBJECT MATTER JURISDICTION
BY FEDERAL QUESTIONS
& FEDERAL PREEMPTION

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES Michael M. McAfee (Pro Se) for McAfee MX, APPELLANT and files this Motion to Challenge Subject Matter Jurisdiction by Federal Questions & Federal Preemption and therefore would respectfully show the Court as follows:

I.

Appellant is entitled to file this motion, as a party need not argue in the trial court, in order to later argue on appeal, that claims are not ripe for adjudication or that a party lacks standing to assert them. "An appellant court may consider, in the first instance, challenges to ripeness and standing and other such prerequisites to subject matter jurisdiction, which is essential to a court's power to decide a case." See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W. 2d 440, 443-446 (Tex. 2000); see also *State Bar of Texas v. Gomez*, 891 S.W. 2d 243, 245 (Tex. 1994). "Indeed, an appellate court *must* examine such issues, even of on its own initiative, to ensure that its decision of the merits is not merely advisory" (emphasis added by author). See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W. 2d 440, 443-446 (Tex. 1993); see also *Steel Co. v. Citizens for a Better Environment*, 323 U.S. 98 (1998).

II.

Appellant McAfee contends that while the State of Texas has authority to regulate noise generally; its trial courts lack subject matter jurisdiction when said claim is based upon a Plaintiff's raising federal questions. It is more specifically so when the questions are of alleged "EPA violations" concerning motorized vehicle

emissions and noise, as Appellees repeatedly contend upon the face of their well-plead complaint.

Appellant further contends that by the trial court's action in the instant case, the State of Texas is attempting to impose a state standard conflicting with the intent and objectives of federal law.

Congress has occupied the field of motorized vehicle engine emissions and noise, and specifically 2 and 4-stroke motorcycle engines, under 42 USC 4901-4918 (The Noise Control Act of 1972) and its related regulatory scheme under 40 CFR 205.150 et seq. Any attempt by the State of Texas to regulate in the narrow field of vehicle engine emissions and noise is in conflict with federal intent and purposes under said regulatory scheme. Appellant concludes and would show this Court that Appellees' state tort law claim is thus barred by federal field and conflict preemption.

III.

The Supremacy Clause of the U.S. Constitution (See *U.S. CONST., VI cl.* 2) gives Congress preemptive power over any state law conflicting with the exercise of federal power. See id; see also *Fidelity Fed. Sav. & Loan v. De La Cuesta*, 458 U.S. 141, 152-153 (1982). The U.S. Supreme Court has established that state law may be preempted by explicit, field, and conflict preemption. See *English v. General Elec. Co.*, 496 U.S. 72 (1990). Under field preemption, state law is preempted

when it regulates conduct in a field that Congress intends the federal government to occupy exclusively. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). "[F]ederal law or regulation may impliedly preempt state law or regulations is the state's scope indicates that Congress intended federal law or regulations to occupy the field exclusively." See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Even if Congress does not completely occupy a given regulatory field, state law is preempted to the extent it conflicts with federal law. See *Geier v. American Honda Co., Inc.* 120 S. Ct. 1913, 1920 (2000).

Appellant contends that any state law (to include state tort law claims) is a form of state regulation subject to the Supremacy Clause. See *Geier,* 120 S. Ct. at 1928; see also *San Diego Bldg. Trades Counsel v. Garmon,* 359 U.S. 236, 247 (1959). It matters not whether the "state law" is a statue, ordinance, common law, or tort law; it is preempted when such state standard is in conflict with the objectives of the federal law. See id.; see also *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 256 (1984).

Congress has made clear its intent to preempt the field of motorized vehicle engine noise: (1) *"the Congress finds" it is a "major source of noise" see 42 USC 4901 (a)(2); (2) that "Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment"* see 42 USC 4901 (a)(3)

(emphasis added by author); (3) "The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." see 42 USC 4901 (b); (4) in "authoriz[ing] the Federal Noise emission standards for products distributed in commerce" id: (5) in stating "The Administrator shall...publish information on the levels of environmental noise the attainment and maintenance of which in *defined areas under various conditions* are requisite to protect the public health and welfare with an adequate margin of safety." see 42 USC 4904 (a)(2) (emphasis added by author); and (6) specifically includes "Transportation equipment *(including recreational vehicles and related equipment" and " Any motor or engine" thereof see 42 USC 4905 (a)(1)(C)(ii) and (iii).*

While federal law says states may "establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products" see 42 USC 4905 (e) (2), they may do so only when said statue, regulation, etc., does not conflict with existing federal laws or regulatory schemes.

If the state allows a jury verdict establishing new standards, not identical and more restrictive than the existing federal scheme regarding

motorized vehicle engine emissions and noise, then every motorcycle operating in the State of Texas would be subject to a claim of "private nuisance" by anyone disliking motorcycles. This increases costs and discourages technological development, which is obviously in conflict with Congressional intent when it enacted the NCA. If a state law is an obstacle to the accomplishment and execution of the full purpose and objective of Congress by interfering with the methods employed in the federal scheme, the state law is preempted. See *Geier*, 120 S. Ct. at 1921; see also *Michigan Canners & Freezers Assoc., Inc. v. Agriculture Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984). As the state of Texas nor Cooke County has not adopted any statutory noise ordinances, Appellees are attempting to "legislate by litigation" to create a new regulatory scheme contrary to Congress' intent in a preempted field. In this attempt, the State of Texas makes it impossible for Appellant to comply with the existing federal regulatory scheme and the "new" scheme the state attempts to create. A state law is preempted if the regulated party cannot comply with both the state and federal regulation. See *Hillsborough County v. Automated Med. Labs., Inc.* 471 U.S. 701, 713 (1985). For these reasons, the case should be dismissed.

A plea of preemption may be defeated if no mechanism exists for private citizens to take action in the Federal Courts; i.e., these is no "complex and interrelated federal scheme of law, remedy, and administration". See *Merrell Dow Pharmaceuticals*

Inc. v. Thompson, 478 U.S. 804 (1986); see also *Mills, et al. v. Warner Lambert Co., et al* Case #03-1052 (Tex. 2005). However, the NCA *does* have a mechanism for private citizens to file actions and seek remedies against alleged violators in Federal Court under a federal common law claim of nuisance see 42 USC 4911 and 28 USC 1331. "....[A]ny person...may commence a civil action on his own behalf" see 42 USC 4911 (a). *"The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to restrain such person from violating such noise control requirement or to order such Administrator to perform such act or duty, as the case may be"* see 42 USC 4911 (a)(2)(B).

While Appellant admits that 42 USC 4911 (e) states "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator)", he contends that this remedy applies *only* after a party has filed suit in federal district court see 42 USC 4911 (a)(2)(B), and proper notice has been given to "(i) to the Administrator of the Environmental Protection Agency...and (ii) to any alleged violator of such requirement" see *42 USC 4911 (b)(1)(a)(i) and (ii).*

IV.

Appellant further contends that the Trial Court did not and does not have subject matter jurisdiction in the instant case, as he would show Appellees failed to rely exclusively on state law in their pleading, by raising federal questions in a preempted field on the face of the pleading. Appellant would point the Court to the face of Appellees' pleading:

"Count two: NUISANCE PER SE/CRIMINAL & EPA VIOLATIONS."

"Plantiffs would show that defendant's motorcycle operation is a nuisance per se and a public nuisance to the community at large. Specifically, the E.P.A. has adopted regulations with respect to motorcycle use and that *federal agency* recognizes that noise in excess of fifty-five decibels harms the *public health, safety, and welfare.*" (See Exhibit "A") (emphasis added by author).

"This so-called "arising under" or "federal question" jurisdiction has long been governed by the well-pleaded-complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." See *Caterpillar v. Williams*, 482 U.S. 386 (1987); see also Gully v. First National *Bank*, 299 U.S. 109 (1936). "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." See *Caterpillar v.*

Williams, 482 U.S. 386 (1987); see also *The Fair Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon.") Exclusive reliance on state law can not exist when Appellees have clearly raised federal questions. The record is clear that Appellees; unceasing pleading of "EPA violations of "odor, fumes and noise" adversely affecting the public health and welfare raises federal questions under *42 USC "Title 42- The Public Health and Welfare". See Exhibit "A", attached and incorporated herein, a certified copy of Plaintiff's 1st Amended Petition of May 4th, 2006, p. 4, 5, 6 and 7.* Appellees' expert's reliance on EPA exhibits and studies authorized under *42 USC* in his testimony is undeniable proof that Appellees did not rely exclusively on state law. See Exhibit "B", attached and incorporated herein, (Plaintiff's Exhibits #3, #4, and #11). *Appellant kindly reminds this Court that he consistently objected to these federal subject matter jurisdiction arguments, exhibits, testimony, etc. See RR 1, p. 14; RR 2, p. 40; RR 3, p. 20, 55-58; and RR 9, p. 5, 28-37, 45, 64, 66, 68, 70-72, and 74; see also Exhibit "A".* Appellant contends that Appellees clearly have advanced federal questions on the face of their pleading, which this Court has accepted as true; or in the alternative, Appellees have crafted an "artful pleading" in which they attempt to hide behide the color of state court jurisdiction while advancing federal questions. A Plaintiff cannot disguise as a state claim a cause of

A cause of action that is necessarily federal in nature. See *Geopel v. National Postal Mail Handlers Union*, 36 F3d 306 (3d Cir. 1994).

In candor to this Court, Appellant states that while Appellees plead that Appellant was a private and public nuisance and a nuisance per se, the jury question spoke exclusively as to whether Appellant was a nuisance to Appellees, and that the subsequent finding at trial was that Appellant was a private nuisance to Appellees. The record is clear that Appellees failed to plead public nuisance under Section 125 of the Tex. Civ. Prac. & Rem. Code, and that Appellant was never warned or cited under Texas Penal Code 42.01. Additionally, the Texas Supreme Court has repeatedly stated that criminal statutes do not always represent the standard for civil liability. See *Reeder v. Daniel*, 61 S.W. 3d 359, 45 Tex. Sup. Ct. J. 85 (Tex. 2001); see also *Carter v. Williams Sommerville & Son, Inc.*, 584 S.W. 2d 274, 22 Tex. Sup. Ct. J. 456 (Tex. 1979).

It is obvious that Appellees have relied heavily upon the alleged "EPA violations" to obtain injunctive relief. Appellees have used apples (a state tort law claim) to try to prove oranges exist (alleged EPA violations under a Federal regulatory scheme). Appellant contends that whether or not Appellees' allegations of "EPA violations" have merit is a matter for the Federal Courts to adjudicate. The purpose of a plea to the jurisdiction is to dismiss a cause of action without regard to whether the claim

has merit. See *Bland ISD v. Blue*, 34 S.W. 3d 547, 554 (Tex. 2000).

Appellant contends that under *28 USC 1331*, [federal question] "The district courts *shall have original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States. Words "all civil actions" were submitted for "all suits of a civil nature, at common law on in equity." *42 USC 4901-4918* are statutes of the United States initiating a federal program of regulating noise pollution with the intent of protecting human health and minimizing annoyance of noise to the general public. The EPA, and not the state, retains responsibility and authority for enforcing alleged violations of the very EPA regulations which Appellees have plead on the face of their complaint.

While states and local governments have the option of enforcing EPA regulations by adopting identical limitations as their own laws or ordinances See *42 USC 4905 (e)(1)(A)* and *(B)*, there is no evidence in the record that the State of Texas nor Cooke County, Texas have adopted such "identical regulations, or in the case of Cooke County, any noise ordinances whatsoever. Appellant thus contends that the State of Texas has waived its jurisdiction in any action regarding allegations of "EPA violations". Appelles therefore have no standing to sue, rendering this case to be moot.

Lack of subject matter jurisdiction is fundamental error and can be raised at any time.See *Sivley v. Sivley*, 972 S.W. 2d 850, 855 (Tex. App.- Tyler 1998, orig. proceeding). "Subject matter jurisdiction cannot be presumed or waived." See *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W. 444, 449 n.2 (Tex 1996). "Lack of jurisdiction makes a judgment void, not just voidable." See *Mapco, Inc. v. Forrest*, 795 S. W. 2d., 700, 703 (Tex. 1990).

V.
ADDITIONAL OPINIONS OF AUTHORITY

The Texas Supreme Court, in *Texas Ass'n of Business v. Texas Air Control Board* 852 S.W. 2nd 440 (Tex. 1993) opined "Because standing is a constitutional prerequisite to maintaining a suit under both Federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield."

Appellant now turns to said jurisprudence of the U.S. Supreme Court, which in *Taylor v. Anderson*, 234 U.S. 74 (1914), stated:

"whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statue[,]....must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."

See also *Baker v. Putnal* 75 F. 3d 190, 196 (5th Cir. 1996) "Also, the court may not look beyond the pleading in ruling on a motion."

VI.

CONCLUSION

McAfee respectfully contends that Appellees have attempted under the *color* of a common law action in state court while raising federal questions in a field preempted by Congress by federal statute and regulation. This case involves federal questions under the authority and regulation of the EPA and should have been filed in federal court. Appellees entire case relies on alleged violations of federal (EPA) standards, federal questions, an implied cause of federal action, expert testimony relying on EPA exhibits, etc. These federal question *"were made"* by Appellees as *"master of their complaint"*, and not Appellant, and should be construed in favor of Appellant, as they pleaded them *on the very face of their complaint.* McAfee contends that it should be viewed and construed under the *prism* of the U.S. Constitution (due process, substantial fair play and justice and the Supremacy Clause), for Appellees' are the *"masters of their complaint"*, from its inception, a federal claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The U.S. Supreme Court also "opined" the same opinion in *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913), when it "opined": *["Of course the party*

who brings a suit is master to decide what law he will rely upon"]. The Texas Supreme Court has also "opined" in No. 03-1052: "Finally, state law is also impliedly preempted if it actually conflicts with federal laws or regulation, because (1) it is impossible for a private party to comply with both state and federal requirements". In the instant case McAfee fully operated a legal business under all Texas laws for 27 months with no violations of Texas law nor any of Cooke County. McAfee however, cannot comply with the alleged federal question of EPA violation of 55 decibals in the operation of his business, therefore federal jurisdiction is mandated.

The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." See *Mansfield, C.L.M.R Co. v. Swan*, 111 U.S. 379, 382 (1884). "Without jurisdiction that court cannot proceed at all in any cause. Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." See *Ex parte McCardle 7 wall.* 506, 514 (1869).

THEREFORE, Appellant respectfully prays that this Honorable Appeals Court, 2nd District, Fort Worth, Texas thereby grant this motion which Appellant may show Himself justly entitled, by Dismissing this cause for lack of subject matter

jurisdiction, and any and all relief entitled to Himself.

Respectfully Submitted By:

Michael M. McAfee- Pro Se
P.O. Box 1772
Gainesville, Tx 76241
Ph: 214-543-1575

CERTIFICATE OF CONFERENCE

I certify that a phone conference was attempted with Brian Lauten, attorney for Appellees', on March 10, 2008 at approx. 10:49 am., regarding the merits of this motion and he was unavailable. It is therefore unknown if he is unopposed or opposed to this motion. As of March 24, 2008, I have not heard back from Mr. Lauten, so I assume this motion is unopposed.

CERTIFICATE OF SERVICE

Pursuant to Rule 9 of the Texas Rules of Appellate Procedure, the undersigned certifies the following: (1) that on the date written in this certificate, I served a true and correct copy of the above and foregoing document in accordance with the requirements of Rule 9 of the Texas Rules of Appellate Procedure on this the 25th day of March, 2008.

Brian P. Lauten VIA: 7006 2760 0005 1869 3703
The Lauten Firm, PC
2626 Cole Ave., Suite 850
Dallas, Tx 75204

/S/: Michael M. McAfee- Pro Se

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-07-00080-CV

MCAFEE MX D/B/A MCAFEE MOTO CROSS AND MICHAEL MARK MCAFEE	APPELLANTS

V.

RICHARD FOSTER, PHILLIP FITZGERALD, JAMES AND SHERRI ESTRADA, RAY AND GABRIELLE FLETCHER, STEVE AND SANDY FAIRFIELD TIM HITCHCOCK, AND HADEN COWDY	APPELLEES

FROM THE 235TH DISTRICT COURT
OF COOKE COUNTY

ORDER

We have considered appellant's "Motion To Challenge Subject Matter Jurisdiction By Federal Questions & Federal Preemption."

The Motion is **DENIED.**

The clerk of this court is directed to transmit a Copy of this order to the appellants and attorney of record.

DATED May 22, 2008.

PER CURIAM

PANEL A: CAYCE, C.J.; LIVINGSTON and MCCOY, JJ.